Supreme Court, U.S.
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No. 98-278

In The

# Supreme Court of the United States

October Term, 1997

IN THE MATTER OF:

VMS LIMITED PARTNERSHIP
SECURITIES LITIGATION

JOHN R. KIRWAN, CAROLYN KIRWAN,
THE JOHN R. KIRWAN TRUST,
CAROLINE SUSAN KIRWAN
and KATHLEEN MARY KIRWAN,

*Petitioners.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

## PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED IN THE PETITION

1. Whether certiorari should be granted so that the Supreme Court may consider whether the absence of a settling defendant's name in a notice of class action settlement is unreasonable per se since it fails to provide adequate notice of the release of claims against that defendant in violation of the Due Process Clause of the Fourteenth Amendment.

2. Whether certiorari should be granted so that the Supreme Court may consider whether the blanket release of claims unrelated to the cause of action made the primary subject matter of a class action settlement is unreasonable per se because it fails to provide adequate notice of claims and causes of action being waived in violation of the Due Process Clause of the Fourteenth Amendment.

## QUESTIONS PRESENTED IN THE BRIEF IN OPPOSITION

1. Whether the adequacy of notice of a class action settlement required by the Due Process Clause of the Fourteenth Amendment is an important question of federal law which recurs frequently enough in class action litigations that it should be settled by this Court.

2. Whether the specific and necessary nature of the information omitted from the class settlement notice at issue makes this case an appropriate vehicle for consideration of the foregoing questions despite the Court of Appeals' error in holding that the Petitioners waived the issue.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

ARGUMENTS FOR GRANTING WRIT ..... 1

1. The adequacy of notice of a class action settlement required by the Due Process Clause of the Fourteenth Amendment is an important question of federal law which recurs frequently enough in class action litigations that it should be settled by this Court ..... 1

2. The specific and necessary nature of the information omitted from the class settlement notice at issue makes this case an appropriate vehicle for consideration of the foregoing question despite the Court of Appeals' error in holding that the Petitioners waived the issue ..... 3

   a. Contrary to the Court of Appeals' holding, Petitioners did not waive the adequacy of notice issue, because the issue was addressed in the Kirwans' Response to Defendants' Motion to Enjoin ..... 3

   b. The Kirwans did not receive adequate notice that their claims against Connecticut General Life Insurance Company for the "churning" of insurance policies would be released by the settlement with CIGNA ..... 4

CONCLUSION ..... 8

# TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT CASES

*Carlson v. Green*, 446 U.S. 14 (1980) ..... 4

*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) ..... 1

*Estelle v. Gamble*, 429 U.S. 97 (1976) .....3, 4

*Milliken v. Meyer*, 311 U.S. 457 (1940) ..... 7

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) .....1, 7

*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) ...1, 7

*Youakim v. Miller*, 425 U.S. 231 (1976) ..... 4

UNITED STATES COURTS OF APPEALS CASES

*In re Auto-Train Corp.*, 810 F.2d 270 (D.C. Cir. 1987) ..... 2

*White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996) ..... 2

**TO THE HONORABLE JUDGES OF SAID COURT:**

COME NOW Petitioners, JOHN R. KIRWAN, CAROLYN KIRWAN, THE JOHN R. KIRWAN TRUST, CAROLINE SUSAN KIRWAN and KATHLEEN MARY KIRWAN ("the Kirwans" or "Petitioners") and reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari, and would respectfully show the Court as follows:

## ARGUMENTS FOR GRANTING WRIT

**1. The adequacy of notice of a class action settlement required by the Due Process Clause of the Fourteenth Amendment is an important question of federal law which recurs frequently enough in class action litigations that it should be settled by this Court.**

Respondents claim that the notice requirement of the Due Process Clause of the Fourteenth Amendment is not important enough to be addressed by this Court or that, if it is, the issue has long been settled by this Court. Indeed, nearly half a century ago the Court set forth the mandate of due process that notice must be reasonably calculated to apprise interested parties of the pendency of the action. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). However, the issue has not been put to rest. Various lawsuits continue to present questions regarding the adequacy of due process notice, particularly where the rights and claims of class members are being released. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S.

156 (1974); *In re Auto-Train Corp.*, 810 F.2d 270 (D.C. Cir. 1987); *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996).

Certiorari should be granted in this case so that the Supreme Court may consider whether the blanket release of claims unrelated to the cause of action made the primary subject matter of a class action and the absence of a settling defendant's name in a notice of class action settlement is unreasonable per se since it fails to provide adequate notice of the release of claims and causes of action in violation of the Due Process Clause of the Fourteenth Amendment. The Supreme Court should make it clear that the Due Process Clause of the Fourteenth Amendment requires that a notice of class action settlement must adequately inform class members of the claims and causes of action they are waiving and specifically inform class members of the identity (*i.e.*, name) of each defendant which the settlement is releasing so the class members may adequately evaluate their interests in the proposed settlement.

**2. The specific and necessary nature of the information omitted from the class settlement notice at issue makes this case an appropriate vehicle for consideration of the foregoing question despite the Court of Appeals' error in holding that the Petitioners waived the issue.**

**a. Contrary to the Court of Appeals' holding, Petitioners did not waive the adequacy of notice issue, because the issue was addressed in the Kirwans' Response to Defendants' Motion to Enjoin.**

In the original pleading filed by the Kirwans in the U.S. District Court for the Northern District of Illinois, Respondent, John R. Kirwan, et al.'s Response to Defendant's Motion to Enjoin, the Kirwans argued that the notice of the class action settlement did not inform them that they would be releasing claims against Connecticut General Life Insurance Company for "churning." *See* Respondent, John R. Kirwan, et al.'s Response to Defendant's Motion to Enjoin, Appendix "A." In paragraph number 3, the Response states, "The notice does not describe the fact that the purchasers of life insurance from Connecticut General Life Insurance Company are included in the class." Also, in paragraph number 6, the Response says, "The notice . . . regarding financial planning does not mention life insurance." These assertions in the Kirwans Response to Defendant's Motion to Enjoin are enough to preserve error for appeal. *See Estelle v. Gamble*, 429 U.S. 97 (1976) (slight allegation in a petition filed *pro se* was enough to preserve error). Therefore, the U.S. Court of Appeals for the Seventh Circuit erred in holding that the adequacy of notice issue had been waived. The Kirwans raised this issue in the District

Court, and both the District Court and the Court of Appeals ignored the issue.

Under the holding of *Estelle v. Gamble*, the issue of inadequate notice was adequately preserved for appeal and for consideration by this Court. Nevertheless, although the Supreme Court does not normally decide issues that are not presented in the courts below, it is not precluded from doing so. *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *Youakim v. Miller*, 425 U.S. 231 (1976). The cases of *Carlson* and *Youakim* hold that issues not necessarily presented in the district court or the court of appeals may be decided by the Supreme Court, and nothing precludes the Supreme Court from addressing the issues presented for the first time in a petition for writ of certiorari. Because this is an important recurring question of federal law, the Court should address the adequacy of notice issue on its merits.

**b. The Kirwans did not receive adequate notice that their claims against Connecticut General Life Insurance Company for the "churning" of insurance policies would be released by the settlement with CIGNA.**

The name of parties being released in a settlement and notice of the specific claims being waived are necessary elements of due process. On February 23, 1993, a settlement notice from the U.S. District Court for the Northern District of Illinois was sent to members of several classes involved in the *VMS Limited Partnership Securities Litigation*, including a Financial Planning Class of

which, solely by virtue of the April 1991 financial planning agreement with CIGNA Securities, Inc., Mr. and Mrs. Kirwan were members. A summary of the settlement notice was published in the *Wall Street Journal* on March 4, 1993. The notice did not advise class members that Connecticut General Life Insurance Company was included as a settling defendant, nor did the notice advise class members that separate claims for unrelated activities such as "churning" insurance policies would be released.

The claims asserted by the Kirwans in the Texas action arose from a separate and distinct transaction, which was specifically excluded from being part of the financial planning agreement made the subject of the *VMS Limited Partnership Securities Litigation*. The Kirwans' purchase of life insurance from Connecticut General Life Insurance Company in October 1991 was not part of the Financial Planning Services Contract which was subject to the Release of Claims contemplated in the *VMS Limited Partnership Securities Litigation* class settlement notice. Nothing in the life insurance contract or the life insurance application connects that purchase of life insurance to any financial plan or financial planning service of CIGNA Securities, Inc., or any arrangement between CIGNA and the Kirwans.

If the reasoning of the Seventh Circuit Court of Appeals and Judge Zagel were correct, the entire separate class action against Connecticut General Life Insurance Company filed in California should have been enjoined by the original VMS Limited Partnership class action. It was not. Why not? If that is what the parties contemplated, why did the John R. Kirwan Trust and the

Trustees not receive notice in the VMS Limited Partnership class action as they did in the Connecticut General class action? This is a travesty of justice, and, with the proliferation of class actions and class action settlements, definitive minimum standards for class notices should be established by the U.S. Supreme Court so the little persons class actions are designed to help receive their due process.

CIGNA admits, at page 4 of its Brief in Opposition, that **only** members of the financial planning class received notice. There is no evidence, no testimony, no documents and no affidavits which show that the Kirwans' purchase of life insurance was related to the financial planning made the subject of the VMS Limited Partnership Securities Litigation. This assertion by CIGNA is not supported by any evidence. The Kirwans did purchase an interest in a VMS Limited Partnership, but the insurance purchase occurred six months after the financial planning contract was signed and was a separate contract altogether. The Court of Appeals' decision ignores the sanctity of separate contracts. The CIGNA notice contradicts the plain language of the Financial Planning Agreement and puts the Kirwans in the unenviable position of deciding which language controls, if they had known they needed to make such a decision. This is especially true since the Financial Planning Agreement's unambiguous language specifically excluded the purchase of life insurance.

The sale of life insurance to the Kirwans was sheer fraud designed to allow the agent, Kathleen Hughes, to earn huge commissions by cashing in the Kirwans' old policies. This transaction was clearly detrimental to the

Kirwans because, as a person gets older, new policies are more expensive and there are new commissions, new surrender charges and new administrative costs, all of which stop the buildup of cash values (cash accumulation) and the compounding of interest on those cash values.

The most fundamental requirements of due process in any proceeding which is to be accorded finality is that notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). The notice must be of such a nature as to reasonably convey to the parties the required information. *Mullane*, 339 U.S. at 314. Moreover, the class notice sent to plaintiffs in a class action should sufficiently describe both the action and the plaintiffs' rights in it. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). A notice which does not identify the defendant or the specific claims being released does not sufficiently describe the action or the plaintiffs' rights therein.

The Connecticut General class action notice proves that a notice containing the name of the defendants and an adequate explanation of the class claims works. *See* Class Notice in *Alan B. Spitz et al. v. Connecticut General Life Insurance Company*, No. CV 95-3566 HLH (Ex.), in the United States District Court for the Central District of California, attached as Exhibit "A" to Respondent, John R. Kirwan, et al.'s Response to Defendant's Motion to Enjoin, Appendix "A." When the Kirwans received the Connecticut General class action notice, they found out

for the first time that they had been defrauded by Connecticut General Life Insurance Company, and they chose to exercise their right to opt out of the class and pursue an individual lawsuit.

## CONCLUSION

The Seventh Circuit Court of Appeals' decision, and Judge Zagel's order enjoining the Texas action, should be overruled for the reasons stated herein and to clarify the minimum requirements of due process.

WHEREFORE, PREMISES CONSIDERED, Petitioners JOHN R. KIRWAN, CAROLYN KIRWAN, THE JOHN R. KIRWAN TRUST, CAROLINE SUSAN KIRWAN and KATHLEEN MARY KIRWAN respectfully request that this Honorable Court grant their Petition for Writ of Certiorari in this matter and for all such other and further relief, both at law and in equity, to which the Kirwans may be justly entitled.

Respectfully submitted,

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*Attorney for Petitioners*

## APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | ) | |
| **VMS LIMITED PARTNERSHIP SECURITIES LITIGATION** | ) | **C.A. NO. 90 C 2412** |
| | ) | **JUDGE JAMES B. ZAGEL** |
| **Consolidated Pretrial Proceeding** | ) | |

**RESPONDENT, JOHN R. KIRWAN, ET AL'S RESPONSE TO DEFENDANT'S MOTION TO ENJOIN**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ZAGEL:

Respondent, John R. Kirwan, would respectfully show unto the Court the following:

1. There is a class action pending directly against Connecticut General Life Insurance Company in the United States District Court for the Central District of California pertaining to life insurance. All of the Kirwan parties, which CIGNA is attempting to enjoin in this lawsuit, have chosen to opt out of the other class action as shown by the notice and the opt our letter attached as Exhibits "A," and "B." This class action clearly pertains to the life insurance obtained by Mr. Kirwan. If, indeed, GICNA's Motion to Enjoin was true and correct, then this class action should have been enjoined. CIGNA's Motion to Enjoin is blatantly frivolous and is a complete violation of Rule 11 F.R.C.P.

2. The notice was not sent to the John R. Kirwan Trust, or to Caroline Susan Kirwan, as Trustee, as shown by Exhibits "C" and "D," attached hereto.

3. The notice does not describe the fact that purchasers of life insurance from Connecticut General Life Insurance Company are included in the class. The Kirwans were unaware they had a life insurance claim when they received the VMS documents.

4. The case of *Wagner v. Nutrasweet Co.*, 873 F. Supp. 87 (N.D.Ill. 1994), holds at page 98:

> Prospective claims not yet in existence or "within the contemplation of the parties" cannot be waived by signing a general release. *See Riley v. American Family Mutual Insurance Co.*, 881 F.2d 368, 371 N. 6 (7th Cir. 1989) ("prospective waivers are unenforceable"); *Fair v. International Flavors & Fragrances*, 905 F.2d 1114, 1115 (7th Cir. 1990) (noting that "courts should not recognize general releases of claims not known or contemplated by the parties at the time of the release"); *Goodman v. Epstein*, 582 F.2d 388, 402 N. 42 (7th Cir. 1978) ("any attempt to release a claim in futuro is invalid"). *See also International Insurance Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d 842, 182 Ill. Dec. 308 (1st Dist. 1993) (general releases apply only to claims in existence at the time the release is executed; claims arising subsequent to execution are discharged only by a "clear expression of intent to that effect"); *Chubb v. Amax Coal Co., Inc.*, 125 Ill.App.3d 682, 686, 80 Ill. Dec. 917, 466 N.E.2d 369 (5th Dist. 1984) (same). . . .

See also *Village of Fox River Grove Illinois v. Grayhill, Inc.*, 806 F. Supp. 785, 795 (N.D.Ill. 1992).

## THE RELEASE IS LIMITED

5. The Case of *Aircrash Disaster at Cove Neck Long Island, N.Y.*, 885 F. Supp. 434 (E.D.N.Y. 1995) holds at page 442: "If the language of an instrument limits the release to certain claims, 'then the release will be operative as to those matters only.' *Herman v. Malamed*, 110 A.D.2d 575, 487 N.Y.2d 791, 793 (1st Dep't. 1985) (citing *Lanni v. Smith*, 89 A.D.2d 782, 453 N.Y.S.2d 497 (4th Dep't.1982), *appeal withdrawn*, 65 N.Y.2d 925 (1985)).

6. The notice attached as Exhibit "C2" to Connecticut General's Motion regarding financial planning does not mention life insurance. Nor does the contract signed by John Kirwan and Caroline Kirwan with Kathleen Hughes for Financial Planning Services mention life insurance. See Exhibit "E". The language of Exhibit "C2" describes financial planning and investment advice. The Court can take judicial notice of the fact that insurance and investment advice regarding stocks and bonds require different licensures and are separate and distinct entitles.

7. The Release of Life Insurance was executed without valid consideration. The case of *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16 (5th Cir. 1992) holds at page 22: "If it is determined that a release was executed without valuable consideration, it nay be invalidated. *Victoria Bank*, 779 S.W.2d at 903; *McClellan v. Boehmer*, 700 S.W.2d 687, 693 (Tex. App. – Corpus Christi 1985, no writ). Mr. Kirwan never received any consideration for the alleged relief of Connecticut General Life Insurance Company.

WHEREFORE, Respondent, John R. Kirwan, respectfully requests this Honorable Court enter an Order denying Connecticut General's Motion to Enjoin, and for all such other relief, both at law and in equity, to which Respondent may be justly entitled.

Respectfully submitted,

/s/ David L. Sheller
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to opposing counsel pursuant to the Texas Rules of Civil Procedure, as follows:

Allister Waldrop — **Via Hand Delivery**
Baker & Botts
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995

Ellen R. Kordik — **Certified Mail/RRR**
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
via the following manner:

**Hand Delivery and/or Certified Mail/RRR**

this the 12th day of December, 1996.

/s/ David L. Sheller
David L. Sheller

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | ) | |
| **VMS LIMITED PARTNERSHIP SECURITIES LITIGATION** | ) | **C.A. NO. 90 C 2412** |
| | ) | **JUDGE JAMES B. ZAGEL** |
| **Consolidated Pretrial Proceeding** | ) | |

**AFFIDAVIT OF DAVID L. SHELLER**

THE STATE OF TEXAS )
)
COUNTY OF HARRIS )

BEFORE ME, the undersigned authority, on this day personally appeared DAVID L. SHELLER, and after being duly sworn by me, deposed and stated as follows:

> "My name is David L. Sheller. I am over 18 years of age, and have never been convicted of a felony or crime of moral turpitude. I am of sound mind and otherwise competent to execute this Affidavit, and the facts stated herein are based upon my personal knowledge.
>
> I am an attorney licensed to practice law in the State of Texas, the State of Alabama, the United States District Court for the Southern District of Texas, and the United States Supreme Court. I have been licensed to practice since 1979, and I am board certified in personal injury trial law by the Texas Board of Legal Specialization. I am the attorney of record for John R. Kirwan, et al in the case styled above.

The following exhibits to Respondent, John R. Kirwan, et al's Response to Defendant's Motion to Enjoin are exact duplicates of documents provided to me in the regular course of my representation of the Kirwans, which I have filed or caused to be filed in my files for the case at or near the time the documents were provided to me in the course of my representation of the Kirwans;

Exhibit A: Class Notice

Exhibit B: Opt Out Letter

Exhibit C: Notification to John R. Kirwan

Exhibit D: Notification to Caroline Kirwan

Exhibit E: Contract for Financial Planning Services

Further, affiant sayeth not.

/s/ David L. Sheller
David L. Sheller

SWORN TO AND SUBSCRIBED BEFORE ME by the said David L. Sheller, on this the 12th day of December, 1996, to certify which witness my official hand and seal of office.

/s/ Sharon Kelly
Notary Public – State of Texas

[SEAL]

NO. 96-44674

| | | |
|---|---|---|
| JOHN R. KIRWAN AND CAROLYN KIRWAN, INDIVIDUALLY AND CAROLINE SUSAN KIRWAN AND KATHLEEN MARY KIRWAN, AS TRUSTEES OF THE OF THE [SIC] JOHN R. KIRWAN, TRUST | ) | IN THE DISTRICT COURT OF |
| VS. | ) | HARRIS COUNTY, TEXAS |
| CONNECTICUT GENERAL LIFE INSURANCE COMPANY AND KATHLEEN J. HUGHES, INDIVIDUALLY AND AS AGENT FOR CONNECTICUT GENERAL LIFE INSURANCE COMPANY | ) | 189TH JUDICIAL DISTRICT |

## AFFIDAVIT OF JOHN R. KIRWAN

THE STATE OF TEXAS

COUNTY OF MIDLAND

BEFORE ME, the undersigned authority, on this day personally appeared JOHN R. KIRWAN, who deposed and stated as follows:

> "My name is John R. Kirwan. I am a resident of Midland, Midland County, Texas. I have personal knowledge of the facts stated herein, and I know them to be true and correct.

"The court should note that there is another class action versus Connecticut General specifically for the sale of life insurance which all parties named in the Motion to Enjoin has opted out of as shown by the letters attached to the Response. My trust and trustee were also notified of the life insurance class action. All parties opted out."

"In 1985 I purchased an interest in the VMS Limited Partnership. It was my understanding that I was part of a class action on that issue. I also admit that I entered into a financial planning contract with CIGNA. However, CIGNA was involved with stocks and bonds. The notice specifically talks about providing financial planning and investment advice for their investments made pursuant to their financial planning contracts. The notice does not say anything about life insurance, which is a separate issue. The notice was only made to John R. Kirwan. It was not made to the John R. Kirwan Trust or Caroline Susan Kirwan, as trustee. I had no notice whatsoever that my life insurance policies were part of this situation. In addition, I did not discover that I had any problem with my life insurance until well after this settlement had been entered into, which was approximately one year ago."

"The notice that has been sent to me does not apprise me that the sale of life insurance to me by a life insurance sales person is part of the class action."

Further, affiant sayeth not.

/s/ John R. Kirwan
John R. Kirwan

SUBSCRIBED AND SWORN TO BEFORE ME by the said John R. Kirwan, this the 10th day of December, 1996, to certify which witness my official hand and seal of office.

[SEAL]

/s/ Randye Biggs
Notary Public – State of Texas

NO. 96-44674

| | | |
|---|---|---|
| JOHN R. KIRWAN AND CAROLYN KIRWAN, INDIVIDUALLY AND CAROLINE SUSAN KIRWAN AND KATHLEEN MARY KIRWAN, AS TRUSTEES OF THE OF THE [SIC] JOHN R. KIRWAN, TRUST | ) | IN THE DISTRICT COURT OF |
| VS. | ) | HARRIS COUNTY, TEXAS |
| CONNECTICUT GENERAL LIFE INSURANCE COMPANY AND KATHLEEN J. HUGHES, INDIVIDUALLY AND AS AGENT FOR CONNECTICUT GENERAL LIFE INSURANCE COMPANY | ) | 189TH JUDICIAL DISTRICT |

## AFFIDAVIT OF CAROLINE S. KIRWAN

THE STATE OF TEXAS

COUNTY OF MIDLAND

BEFORE ME, the undersigned authority, on this day personally appeared CAROLINE S. KIRWAN, who deposed and stated as follows:

> "My name is Caroline S. Kirwan. I am a resident of Midland, Midland County, Texas. I have personal knowledge of the facts stated herein, and I know them to be true and correct.

"The notice of the class action pertaining to Connecticut General Life Insurance Company was sent to me as "owner" of Policy No. 5065553. The notice stated the insured was John R. Kirwan. Policy No. 5065553 was actually placed in the John R. Kirwan Trust. The John R. Kirwan trust is the actual owner of the policy for which I am co-trustee with my sister Kathleen Kirwan.

"I never received any notice regarding the class action lawsuit captioned *In the Matter of VMS Limited Partnership Securities Litigation,"* pertaining to financial planning and investment advice involving CIGNA. The only notice regarding a class action I ever received from CIGNA is the current one regarding life insurance."

Further, affiant sayeth not.

/s/ Caroline S. Kirwan
Caroline S. Kirwan

SUBSCRIBED AND SWORN TO BEFORE ME by the said Caroline S. Kirwan, this the 10th day of December, 1996, to certify which witness my official hand and seal of office.

[SEAL]

/s/ Randye Biggs
Notary Public – State of Texas

**EXHIBIT A**

**CLASS NOTICE**

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| ALAN B. SPITZ, and LINDA H. SPITZ, individually and on behalf of all persons similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>CONNECTICUT GENERAL LIFE INSURANCE COMPANY,<br><br>Defendants. | No. CV 95-3566 HLH (Ex)<br><br>**NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTION** |

**IF YOU PURCHASED A LIFE INSURANCE POLICY FROM CONNECTICUT GENERAL LIFE INSURANCE COMPANY BETWEEN AUGUST 1, 1983 AND MARCH 26, 1996, PLEASE READ THIS NOTICE CAREFULLY. IT DESCRIBES VALUABLE BENEFITS THAT MAY BE AVAILABLE TO YOU AND IT MAY AFFECT YOUR RIGHTS. YOU ARE NOT BEING SUED.**

You are hereby notified, pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court for the Central District of California (the "Court"), that a settlement (the "Settlement") has been reached by the parties in this action. If approved by the Court, the Settlement will result in: (a) in adjustments to enhance the performance of certain life

insurance policies issued during the period from August 1, 1983 through March 26, 1996 (the "Class Period") by Connecticut General Life Insurance Company ("CGLIC"); (b) the creation of a procedure for prompt resolution of misrepresentation claims relating to those policies (the "ADR Process" as described below) and (c) the release of claims as defined below.

This Notice summarizes the terms of the proposed Settlement. All of the details of the Settlement are set forth in the Stipulation of Settlement, which has been filed with the Court and may be inspected during regular business hours.

## I. BACKGROUND OF THE LITIGATION.

A lawsuit is pending in the Court between defendant Connecticut General Life Insurance Company (hereinafter "the Company" or "CGLIC") and plaintiffs Alan B. and Linda H. Spitz, CGLIC life insurance policy owners. The Spitzes allege, on behalf of themselves and for all persons similarly situated, that the Company improperly included the effects of certain provisions of the Omnibus Budget Reconciliation Act of 1990, known as the "DAC Tax," in determining flexible or adjustable components under the CGLIC policies identified as "DAC TAX Policies" in Exhibit 2, attached hereto. The Spitzes also allege that the Company committed fraud and misrepresentation in the sale of life insurance policies by falsely representing the number of out-of-pocket payments that would be required for the life insurance policies in Exhibit 1.

A similar lawsuit is pending in the United States District Court for the Eastern District of Pennsylvania. In that lawsuit, plaintiff Ann Novacheck alleges, on behalf of herself and all persons similarly situated, that the Company committed fraud and misrepresentation in the sale of life insurance policies by falsely representing the number of out-of-pocket payments that would be required for the life insurance policies identified in Exhibit 1.

The plaintiffs, through their counsel, have conducted a thorough examination and investigation of the facts and law relating to the matters at issue in the lawsuit, and the parties have engaged in extensive, arms-length negotiations. Taking into account the extensive burdens and expenses associated with protracted trials and appeals, the plaintiffs have concluded that the proposed Settlement provides a fair, cost-effective and assured method of resolving claims, and is fair, reasonable, adequate and in the best interests of the Class.

Nothing in the Settlement shall be construed as an admission of wrongdoing on the part of CGLIC. The Company denies any wrongdoing in connection with the sale and administration of its life insurance policies. The Company firmly believes it has correctly applied the impact of federal tax laws, including the DAC Tax, in its policy computations, and that it has marketed the products properly and has in all respects acted in accordance with the terms of the policies in question. Nonetheless, CGLIC is determined to meet the concerns of its policy owners and to insure policy owner satisfaction. It is the

Company's belief that the proposed Settlement accomplishes these goals by efficiently providing immediate and substantial benefits to its policy owners.

In addition, the Company believes that further litigation of this matter would be protracted and expensive. Such activity would unavoidably divert resources that the Company would prefer to employ in serving its policy owners. For this reason as well, the Company believes that it is desirable that this litigation be fully and finally settled in the manner and upon the terms set forth in the proposed Settlement.

The Court has not considered the merits of the plaintiffs' claims, and this Notice should not be understood as an expression of any opinion by the Court as to the merits of any claims or defenses asserted by Plaintiffs or Defendant.

## II. THE CLASS.

The proposed Settlement Class consists of current and former owners of individual interest-sensitive whole life, universal life, and participating life insurance policies issued by the Company during the Class Period. The Settlement Class does not include the Company's COLI products. A list of all policies included in the Settlement is attached hereto as Exhibit 1.

## III. BENEFITS OF THE PROPOSED SETTLEMENT.

If approved by the Court, the Settlement will provide the following benefits to the Settlement Class:

**A. Benefits To The DAC Tax Policies.**

For members of the Settlement Class whose policies are in-force DAC Tax Policies, CGLIC will make adjustments in the calculation of flexible policy factors. These adjustments will be made automatically, and eligible class members need not take any action to claim such benefits. These adjustments are estimated to have an expected aggregate impact on policy owner cash surrender values of approximately $34.671 million over the lives of the policies and an expected net present value of approximately $13.050 million when discounted at a six percent annual rate. This amount assumes no lapses among the class members receiving these benefits. The benefits will begin at different times, depending on the particular policy, with some of the benefits becoming effective as of March 1, 1996. Benefits under this section will vary according to the value and type of policy.

For members of the Settlement Class whose DAC Tax Policies have lapsed between June 1, 1991 and December 27, 1996, CGLIC will make available for direct purchase a Connecticut General fixed annuity which is currently available in the lapsed policy owner's state of domicile. Eligible class members may make an initial payment into the annuity of an amount equal to a maximum of the sum of all premiums payable into the insurance policy from its issue date until the present. CGLIC will make a one-time three percent enhancement of that initial payment. To claim this benefit, eligible class members must make this payment within sixty (60) days of receipt of the Post-Settlement Notice, following approval by the court of the proposed settlement.

**B. Alternative Dispute Resolution Benefits Available To All Class Members.**

If you believe that the Company or its agents said or did anything to mislead you in your decision to purchase a life insurance policy identified in Exhibit 1, you may seek relief by participating in a claim evaluation process paid for by the Company. For example, if you believe that the Company or its agents misled you about the number of out-of-pocket payments required for your policy, you may seek relief by submitting a claim. You may call either toll-free "800" number on the last page of this Notice for more detailed information about possible misrepresentation claims. Remedies available under this process range from no relief to the full "benefit of the bargain" (i.e., the Company will provide an insurance product consistent with the terms of the alleged misrepresentation).

If you wish to pursue a misrepresentation claim, you must submit a Claim Form setting forth under oath the time, location, content, and nature (oral, written or both) of the alleged misrepresentation(s), along with any other information you believe supports the misrepresentation claim. You must attach to the Claim Form any relevant documents in your possession, custody or control, and describe any relevant documents you have seen but do not currently possess or control. Claim Forms will be mailed to all members of the Settlement Class as part of the Post-Settlement Notice, following approval by the Court of the proposed Settlement. There will be no cost to you for submitting a Claim Form. To be considered, Claim Forms must be post-marked no later than July 13, 1997.

Claims will be evaluated by at least one member of a Review Team comprised of CGLIC employees with experience in evaluating policy owner complaints. The Review Team may also interview the agent in question and will assemble all relevant documentation. The Review Team will evaluate each claim in accordance with a Scoring System approved by the Court, choose the remedy called for under the Scoring System, and mail its decision to each claimant in a form approved by the Court. The Review Team will be audited on behalf of Class Counsel, and all costs of the audit will be paid by the Company.

If you are dissatisfied with the decision of the Review Team, you may request alternative dispute resolution ("ADR") of the claim. There is no cost to you for requesting ADR. To request ADR, you must submit an ADR Request Form, in a form to be approved by the Court, to the Company within 20 days after receiving notice of the proposed remedy from the Review Team.

If you request ADR, the Policy Owner Referee, a person chosen by Class Counsel to protect your interests, will review the investigation and decision of the Review Team to determine whether the Review Team conducted an adequate investigation, and whether the Review Team applied the Scoring System in an accurate and fair manner. The Policy Owner Referee will mail to you a report in a form to be approved by the Court. After receiving the Policy Owner Referee's report, you may elect to continue with ADR or to accept the Review Team's proposed Remedy.

If you elect to continue with ADR, the claim will be assigned to an individual arbitrator selected from an arbitration panel whose composition will be determined jointly by Class Counsel and CGLIC's counsel. The arbitrator will receive the claim file from the Review Team. In addition, you and the Company may submit 5-page written briefs in support of your positions.

Arbitration hearings will be held within 150 miles of the residence of each claimant. Whenever feasible, the hearing will be held within 50 miles of the claimant. Upon your election, the hearing will be conducted by telephone conference call, to be arranged and paid for by the Company, excluding your costs or the costs of your counsel. At the hearing, you and the Company will be permitted to make brief oral presentations outlining your positions, and you may be asked questions by the arbitrator. You may, but need not, be represented by counsel (at your expense) at the hearing.

In reaching a decision, the arbitrator will be limited to the Scoring System and remedies set forth in the Stipulation of Settlement. The decision of the arbitrator will be binding on all parties, regardless of whether the arbitrator's award is more or less favorable to you than the proposed Remedy from the Review Team.

## IV. ATTORNEYS' FEES.

Defendant CGLIC will make a lump sum payment of attorneys' fees to the Spitz Plaintiffs' counsel in the amount of $1.35 million, upon approval by the Court of the proposed Settlement. In addition, CGLIC will pay for all expenses incurred in providing the required Class

Notices, and in administering the Settlement and ADR Process, except that Class Members will be responsible for any costs and fees of any counsel retained to represent them individually at the Settlement Hearing or during the arbitration phase of the ADR Process. Furthermore, upon conclusion of the ADR Process, CGLIC will pay the Spitz Plaintiffs' counsel attorneys' fees equal to ten percent of the aggregate recovery by ADR Claimants under that process. Finally, CGLIC will advance the attorneys' fees payable under the preceding sentence at court-approved hourly rates for certain specified activities requiring Class counsel's attention during the administration of the ADR Process.

Counsel for plaintiff in the Novacheck action will petition the Court for an award of attorneys' fees to be paid by CGLIC. CGLIC reserves the right to oppose that request.

## V. INCENTIVE AWARD TO NAMED PLAINTIFFS.

Plaintiffs Alan and Linda Spitz and plaintiff Ann Novacheck reserve the right to request from the Court an incentive award, not to exceed the sum of $25,000 for the Spitzes and the sum of $25,000 for Ann Novacheck, upon notice to the Class, in recognition of their efforts as Class Representatives in this litigation, including consultations with counsel, participation in exchanges of information regarding claims asserted, and an analysis of the proposed settlement. CGLIC agrees not to oppose the request for incentive awards and further agrees to pay any sum awarded as incentives to plaintiffs Alan and Linda Spitz and plaintiff Ann Novacheck, in addition to all other

consideration paid or to be paid as a result of this settlement.

## VI. FINAL RESOLUTION OF CLAIMS.

If the proposed Settlement is approved by the Court, Class Members will receive the benefits described herein and specifically defined in the settlement. In exchange, Class Members will permanently give up the right to assert any and all claims, known or unknown, that they currently possess, may possess, or may have possessed against CGLIC (including claims against its past or present officers, directors, agents, employees, parents, affiliates, subsidiaries, divisions, successors, assigns, or legal representatives) relating in any way to the life insurance policies that are the subject of this lawsuit. Such claims could include without limitation breach of contract, breach of implied covenant of good faith and fair dealing and fraud, and could give rise to compensatory and punitive and exemplary damages. If you do not exclude yourself from the Class, you will give up your right to assert any such claims. The release does not preclude assertion of misrepresentation claims in the ADR proceeding. Furthermore, regardless of whether you participate in the Settlement, CGLIC will continue to apply premiums and pay death benefits under its policies in accordance with the terms and conditions of those policies.

If the proposed Settlement is not approved by the Court or does not become final for any reason, the litigation will continue against Defendant CGLIC.

## VII. THE SETTLEMENT HEARING.

A hearing will be held on January 13, 1997, at 10:00 a.m. in Courtroom 7 of the United States District Court for the Central District of California, 312 North Spring Street, Los Angeles, California, before the Honorable Harry L. Hupp, to determine: A) whether the proposed Settlement should be approved as fair, adequate and reasonable; B) the amount of the incentive award that should be awarded to the named Plaintiffs; and C) the amount of attorneys' fees, litigation costs and expenses that should be awarded to Plaintiffs' counsel. The hearing may be continued without further notice. It is not necessary for you to appear at the Settlement Hearing.

## VIII. EXAMINATION OF RECORDS AND INQUIRIES.

This Notice is only a summary of the basic terms of the proposed Settlement. You are referred to the Stipulation of Settlement that is on file with the Clerk of the Court for the precise terms and conditions of the proposed Settlement. The terms of the Stipulation of Settlement control over the summary set forth herein.

## IX. THE RIGHTS OF CLASS MEMBERS.

Your options as a member of the Class are as follows:

### A. You May Do Nothing and Remain A Member of the Class.

If you wish to receive the benefits described above, you do not have to do anything. If you choose to take no

action, you will remain a member of the Class, your interests as a Class Member will be represented by the named plaintiffs and their counsel, and you will be bound by the terms of the Settlement, if approved by the Court, and any final judgments that may be entered.

As a member of the Class, you will not be responsible for attorneys' fees or litigation expenses.

**B. You May Remain a Member of the Class and Assert an Objection to the Proposed Settlement.**

If you wish to remain in the Class, but wish to object to the fairness, reasonableness, or adequacy of this Settlement, you must serve on Class counsel and CGLIC's counsel and file with the Court, no later than December 27, 1996, a statement of the objection, as well as the specific reason(s), if any, for each objection, including any legal support that you wish to bring to the Court's attention and any evidence you wish to introduce in support of the objection. You may do so either on your own or through an attorney hired at your own expense. If you hire an attorney to represent you, the attorney must (i) file a notice of appearance with the Clerk of Court no later than December 27, 1996 and (ii) serve on Plaintiffs' counsel and CGLIC's counsel, by December 27, 1996, a copy of the same. Any judgment entered in this action, whether favorable or unfavorable to the Class, will include and be binding on all Class Members who have not been excluded from the Class, even if they have objected to the Proposed Settlement and even if they have any other claim, lawsuit or proceeding pending against Defendants.

Objections, appearances, and any other documents filed with the Court must be served on counsel at the following addresses:

Robert K. Scott
Douglas K. deVries
c/o The Law Offices of
Robert K. Scott
660 Newport Center Drive,
Suite 950
Newport Beach, CA 92660
(Counsel for plaintiffs)

Mark C. Rifkin
Greenfield & Rifkin LLP
800 Times Building
Ardmore, PA 19003
(Counsel for plaintiffs)

John W. Stamper
George H. Brown
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899
(Counsel for CGLIC)

**C. You May Request Exclusion From the Class.**

If you do not wish to receive the benefits described above, you may exclude yourself from the Class. Your request for exclusion must be in writing, must include your name, address, telephone number, and policy number(s), and must be sent to: CGLIC Litigation, Post Office Box 3190, Los Angeles, California 92834. NO REQUEST FOR EXCLUSION WILL BE VALID UNLESS IT CONTAINS ALL THE INFORMATION DESCRIBED ABOVE AND IS POSTMARKED NO LATER THAN DECEMBER 27, 1996. In order to insure timely handling of your request, the words "REQUEST FOR EXCLUSION" should be typewritten or legibly handwritten on the front of the envelope containing your exclusion request.

If you exclude yourself from the Class and the proposed Settlement is approved by the Court, you will not be eligible to share in the proceeds of any settlement and will remain free to pursue any legal rights you may have against Defendant.

For information regarding your rights and the terms of the proposed Settlement, you may contact Class Counsel as follows:

By mail: Class Counsel
CGLIC Class Action
P.O. Box 3190
Fullerton, CA 92834

By telephone: 1-(800) 607-5556

For information regarding the current status of your policy, you may call toll free 1-(800) 250-4381 to speak to a representative of CGLIC:

DO NOT CONTACT THE COURT REGARDING THIS NOTICE.

DATED: October 9, 1996

Clerk of the Court
United States District Court
Central District of California

## EXHIBIT 1

## LIST OF POLICIES INCLUDED IN THE SETTLEMENT CLASS

Advance
Forms LN501, LN502, LN511 and state variations (excluding COLI policies sold using the same Form number)

Estate Preference I, II, 1.5; and 3
Forms LN700 and state variations

Preference I
Forms LN 395BB, LN396BB, LN397BB, LN398BB and state variations

Preference II
Forms LN800, LN801 and state variations

Preference II+
Forms LN395BB and LN396BB

Preference 3
Forms LN800, LN801 and state variations

Preference 3+
Forms LN395, LN396 and state variations

1978 Edition Participating
Forms LP120 and LP121 and state variations

Plus One
Form LN500 and state variations

Corporate Continuum
Form LN505 and state variations (excluding COLI policies sold under the same form number)

Estate Continuum
Form LN750 and state variations

UL-1
Form LN525 and state variations

SUL-1
Form LN770 and state variations

WL-1
Form LN805, LN806 and state variations

Continuum
Form LN505 and state variations (excluding COLI policies sold under the same form number)

Precedent
Forms LN410-LN413, LN450-LN453, LN461-LN463 and LN470-LN473, all when issued with a Cash Plan Rider; and Forms LN351, LN380, and LN381 and state variations

Choice
Forms LP150-153

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## EXHIBIT 2

## DAC TAX POLICIES

**I. Estate Preference I.** Estate Preference I ("EPI") policies (Policy Form LN700 and state variations) purchased during the period from 1988 (product inception) through December 31, 1995.

**II. Preference I.** Preference I policies (Policy Forms LN395BB, LN396BB, LN397BB, LN398BB and state variations) purchased during the period from January, 1989 through December 31, 1995.

**III. Preference II and Preference II+.** Preference II policies (Policy Forms LN800, LN801 and state variations) and owners of Preference II+ (Policy Forms LN395BB and

LN396BB and state variations) purchased during the period from September, 1990 (product inception) through December 31, 1995.

**IV. Advance.** Advance policies (Policy Forms LN 501, LN511, LN502 and state variations) purchased during the period from March 1984 (product inception) through December 31, 1995.

**V. Continuum.** Continuum policies (Policy Form LN505 and state variations) purchased during the period from January, 1987, (product inception) through December 31, 1995.

**VI. Precedent.** Precedent policies (Policy Forms LN410-LN413, LN450-LN453, LN461-LN463 and LN470-LN473, all when issued with a Cash Plus Rider ("CPR") and Policy Forms LN351, LN380 and LN381 and state variations thereof) purchased during the period from August, 1983, (product inception) through June, 1990 (product end).

**VII. Choice.** Choice policies (Policy Forms LP150-LP153) purchased during the period from January, 1984 (product inception) through December 31, 1987 (product end).

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**EXHIBIT B**

October 29, 1996

CGLIC Litigation
Post Office Box 3190
Fullerton, California 92834

RE: REQUEST FOR EXCLUSION

To Whom It May Concern:

Please be advised that I, John R. Kirwan, wish to be excluded from the class action settlement. The policy which I purchased, number 5065553, was placed in the John R. Kirwan Trust. My address and the address for the trust is 301 N. Colorado, Suite 228, Midland, Texas 79701. My current telephone number is (915) 682-8619, however, I wish to be contacted through my attorney, David L. Sheller, at (713) 961-0291.

Sincerely,

/s/ John R. Kirwan
John R. Kirwan

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SENDER:
• Complete items 1 and/or 2 for additional services.
• Complete items 3, 4a, and 4b
• Print your name and address on the reverse of this form so that we can return this card to you.
• Attach this form to the front of the mailpiece, or on the back if space does not permit.
• Write *"Return Receipt Requested"* on the mailpiece below the article number.

• The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. [ ] Addressee's Address
2. [ ] Restricted Delivery

Consult postmaster for fee.

Is your RETURN ADDRESS completed on the reverse side?

3. Article Addressed to:
CGLIC Litigation
P.O. Box 3190
Fullerton, CA 92834

4a. Article Number
P 6/7 113 620
4b. Service Type
[ ] Registered
[ ] Express Mail
[X] Return Receipt for Merchandise
[X] Certified
[ ] Insured
[ ] COD

5. Received By: (*Print Name*)
Donice M Price
6. Signature: (*Addressee or Agent*)
X /s/ Donice Price

7. Date of Delivery
11-5-96

8. Addressee's Address (*Only if requested and fee is paid*)
Kirwan
PS Form 3811, December 1994 Domestic Return

Thank you for using Return Receipt Service.

UNITED STATES POSTAL SERVICE
Bar Code
First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10
• Print your name, address, and ZIP Code in this box •

DAVID L. SHELLER & ASSOCIATES
SUITE 3028, THE COASTAL TOWER
9 GREENWAY PLAZA
HOUSTON, TEXAS 77046

Letter Re:
Request For Exclusion

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**EXHIBIT C**

The enclosed notice pertains to Connecticut General Life Insurance Policy:

Number: 5065553

Insured: John R Kirwan

Owner: John R Kirwan

If you are not the owner of this policy, this notice is for information only.

John R Kirwan
2405 Shell
Midland TX 79705-8520

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**EXHIBIT D**

The enclosed notice pertains to Connecticut General Life Insurance Policy:

Number: 5065553

Insured: John R Kirwan

Owner: Caroline Kirwan

If you are not the owner of this policy, this notice is for information only.

Caroline Kirwan
2405 Shell
Midland TX 79705-8520

**EXHIBIT E**

CIGNA Securities, Inc.
[LOGO]

FINANCIAL PLANNING SERVICES
ONE YEAR CONTRACT

Financial Planning Services Contract Between CIGNA Securities, Inc., a registered investment advisor ("Advisor") and the client named below.

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1. GENERAL PURPOSE.

By this contract, you engage Advisor to provide personal financial planning services for a period of one year, as described below, and Advisor agrees to provide these services.

2. SERVICES TO BE PROVIDED.

During the term of this contract Advisor will provide planning services in the areas specified below. Planning services will be summarized by a written plan for you which reflects your current financial circumstances, your financial outlook and your personal objectives.

[X] Estate Planning
[ ] Business Continuity Planning
[X] Retirement Planning
[ ] Fringe Benefit Planning
[ ] Income Tax Planning
[ ] Investment Planning

3. PLANNING WILL FOLLOW THIS PROCESS.

In creating your plan, you and Advisor will follow this process:

a. Data: You will provide Advisor with financial and personal data necessary to prepare your plan.

b. Analysis: Advisor will analyze data and documents provided, evaluate your ability to meet your objectives, make observations, identify problems and recommend strategies for your consideration.

c. Written Plan: On the basis of the data you provide and the objectives chosen, Advisor will prepare and present a personal financial plan summarized in written form.

4. COMPENSATION TO ADVISOR FOR PLANNING SERVICES.

For the financial planning services described above, you agree to pay a fee of $1250.00.

*(Continued on reverse)*

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This financial planning contract is agreed to between us, effective (*Date*) 4-24-91 at (*City/State*) MIDLAND, TEXAS

Name of Client John R. Kirwan
Social Security Number 441-20-7200
Name of Client Carolyn Kirwan
Social Security Number 085-24-2537
Street 400 West Texas; 1216 Vaughn Bldg
City Midland State TX Zip 79701
Phone: Bus. 915-682-8619 Home 915-684-4191
Client Signature /s/ John R. Kirwan
Client Signature /s/ Carloyn Kirwan

By /s/ Kathleen J. Hughes
*Authorized Representative*

By /s/ Illegible
*Authorized Representative*

5. IMPLEMENTATION OF YOUR FINANCIAL PLAN.

The services of Advisor under this contract are limited to recommending strategies for you to consider to achieve your financial objectives. We will at your request, facilitate and coordinate the necessary steps to implement your plan in conjunction with your attorney, accountant and other pertinent advisors. However, our services are analytical and advisory only and do not include any legal, accounting or other professional services.

Implementation of product related recommendations is not included under this financial planning contract. If you desire, CIGNA Securities, Inc. and its affiliates, acting in a sales capacity, will recommend specific investments, insurance or other financial products through which your plan can be specifically implemented. The purchase of such products normally results in the payment of commissions. There is no additional fee for this service.

6. RENEWAL OF YOUR FINANCIAL PLAN.

At the end of the term of this contract, you may engage Advisor to provide financial services for an additional year. Advisor will determine the renewal fee based on services to be provided. Both you and Advisor retain the right not to renew this contract.

7. MAJOR REVISIONS.

If at any time your Plan requires a major revision (resulting, for example, from the sale of a business or a divorce) an additional fee may be charged. We will quote this fee to you and receive your consent to it in advance of performing any work on the revision.

8. RECEIPT OF DISCLOSURE BROCHURE.

You acknowledge receipt of Advisor's Disclosure Brochure. This Disclosure Brochure has been prepared and delivered in accordance with the Investment Adviser's Act of 1940 and the rules thereunder. It contains important information concerning the background and organization of Advisor and its key people. It also describes possible conflicts of interest. You should be aware of the multiple roles which CIGNA Securities, Inc. and its affiliates play as financial advisor and as issuer, investment manager and/or broker with respect to various financial products.

9. NO RIGHT OF ASSIGNMENT.

Advisor may not assign this contract, as that term is defined in the Investment Adviser's Act of 1940.

10. RIGHT TO TERMINATE.

You have the right to terminate this contract without penalty at any time within five business days after the effective date of this contract. To effect termination you must notify Advisor in writing.

11. ENTIRE AGREEMENT; AMENDMENT

This contract constitutes the entire agreement between us. It may be amended only by a written agreement signed by you and by an officer of Advisor.

12. NOTICES.

All notices and other communications hereunder shall be in writing.

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